Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75 7411

E. J. LEE & LEE BOATS, INC.,

Petitioners,

versus

VENICE WORK VESSELS, INC., *et al.*,
LEANDER H. PEREZ, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, E. J. Lee and Lee Boats, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on August 18, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 512 F.2d 85, and is annexed in the Appendix hereto, marked "Appendix A." The opinion of the United States District Court for the Eastern District of Louisiana is not reported and is annexed in the Appendix, marked "Appendix B."

JURISDICTION

The respondent obtained leave of the Court below to file an interlocutory appeal pursuant to 28 U.S.C. §1292(b) and Rule 5, F.R.A.P. The Court of Appeals rendered judgment in favor of the respondent on April 25, 1975, which judgment was not then entered because petitioner filed a timely petition for rehearing and for rehearing *en banc*, which was denied on August 18, 1975 ("Appendix C"), at which time the judgment of the said Court was entered.

This petition for certiorari was filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a private cause of action for actual damages under the federal antitrust law survives against the heirs of the alleged wrongdoer when the suit is filed within one year after the entry of a final judgment or decree in a suit brought by the United States based on the same alleged violations of the antitrust law but the alleged wrongdoer, in the period of suspension of the statute of limitations, died, his estate was administered and it was put in the possession of his heirs "without benefit of inventory."

2. Whether, if a private cause of action for actual damages survives against the estate of the alleged wrongdoer, the State law of succession and distribution of the estate governs whether or not the plaintiff's cause of action is extinguished by the administration and distribution of

the estate.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15, Section 16(b):

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under Section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Rule 15, Federal Rules of Civil Procedure (F.R.C.P.):

> (a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a

> party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders.
>
> (b) * * *
>
> (c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> * * *
>
> (d) Supplemental Pleadings. * * *

Article 1013, Louisiana Civil Code (La.C.C.):

> The effect of the simple acceptance of the succession, whether express or

tacit, is such, that when made by an heir of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of his own property, as if he had himself contracted the debts or as if he was the deceased himself; unless, before acting as heir, he make a true and faithful inventory of the effects of the succession, as here above established, or has taken the benefit treated of hereafter.

Article 1032, Louisiana Civil Code:

The benefit of inventory is the privilege, which the heir obtains, of being liable for the charges and debts of the succession only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner hereinafter prescribed.

Article 1054, Louisiana Civil Code:

The effect of the benefit of inventory is that it gives the heir the advantage:

1. Of being discharged from the debts of the succession by abandoning all the effects of the succession to the creditors and legatees;

2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due on him from it.

Article 1056, Louisiana Civil Code:

If * * * the beneficiary heir declares that he accepts the succession simply, all the effects which compose it must immediately be delivered to him, but then he becomes responsible for the debts of the succession, not only to the amount of the effects thereof, but personally and out of his own property, and the creditors of the deceased can obtain judgment against him.

Article 1423, Louisiana Civil Code:

The heirs by the fact alone of the simple acceptance of a succession left them, contract the obligation to discharge all the debts of such succession, to whatever sum they may amount, though they far exceed the value of the effects composing it.

The only exception to this rule is when the heirs, before meddling with the succession, have caused a true and faithful inventory thereof to be made, as is prescribed in the section of this title which relates to the *benefit of inventory;* for in this case they are only bound for the debts to the amount of the value of the effects found in the succession. (Italics in original.)

STATEMENT OF THE CASE

The Court below accurately summarized the facts relative to the issues with which this petition is involved, as follows.

"The United States instituted a civil antitrust action against a number of defendants, including Leander H. Perez, Sr. (Perez, Sr.) on November 6, 1967, asserting unlawful conduct on his part in 1965. Perez, Sr. died March 19, 1969. Letters of Administration on his estate were issued on April 24, 1969 to his son, Leander H. Perez, Jr. (Administrator). The suit by the United States against Perez, Sr. was dismissed on May 7, 1969, but continued against the remaining defendants. On November 24, 1971 the administration of the estate of Perez, Sr. was concluded, the heirs were put in possession and the Administrator was released. On April 10, 1972 the United States action against the remaining defendants was terminated by the entry of a final consent decree.

"[Petitioners], on December 29, 1972, filed a private civil antitrust action for treble damages naming "Leander H. Perez, Jr. Administrator of the Estate of Leander

H. Perez, Sr." as one of several defendants. Following a motion to dismiss on the ground that there was no longer an administrator in being, [petitioners], with leave of court, amended the complaint on December 31, 1973 by adding the four heirs, including Perez, Jr., as defendants. Upon the heirs' motion to dismiss the court below denied the motion of Perez, Jr. and withheld ruling on the motion of the other three heirs pending an evidentiary hearing. Perez, Jr., with requisite permission, * * * appealed." *Lee v. Venice Work Vessels, Inc.*, 512 F.2d, at 85-86, 1975 Slip Opinions, 5th Circuit, pp. 5233-34 (Appendix A, *infra*).

The one significant fact omitted from the foregoing is that the attorney for the respondent, Leander H. Perez, Jr., did not file the motion to dismiss on the ground that the legal status of the respondent had ceased to exist until a short period, approximately a week, following the con-

clusion of the running of the one year period of suspension authorized by 15 U.S. C. §16(b).

Even though the District Court had reserved action on the motion to dismiss by the other three heirs who had not been as directly notified of the pendency of this action as had Leander H. Perez, Jr., who had been served in accordance with the Federal Rules of Civil Procedure, pending an evidentiary hearing to determine whether the "relation back" provisions of Rule 15(c), F.R.C.P. were applicable to them; and, even though the said three heirs had not themselves sought or obtained permission to interlocutorily appeal from the judgment in favor of plaintiff-petitioner, the Court below instructed the District Court "to act upon the motions of Chalin O. Perez, Joyce Perez Gelpi and Betty Perez Carrere consistently with this opinion." *Lee v. Venice Work Vessels, Inc.*,

supra, 512 F.2d at 88, 1975 Slip Opinions, 5th Cir., p. 5236 (Appendix A).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PUTS IN THE HANDS OF THE HEIRS OF AN ESTATE OF A FEDERAL ANTITRUST LAW VIOLATOR THE MEANS TO AVOID RECOVERY BY A PERSON INJURED BY SUCH VIOLATIONS OF THE FEDERAL LAW, SIMPLY BY TAKING POSSESSION OF AN ESTATE WITHOUT "BENEFIT OF INVENTORY," WHICH, UNDER THE LAW OF LOUISIANA, WOULD IMPOSE THE CONDITION THAT THE HEIRS WOULD BE LIABLE FOR ALL DEBTS, EVEN BEYOND THE EFFECTS OF THE SUCCESSION. THUS, THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT, AND IT HAS DONE SO IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT RELATIVE TO THE DETERMINATION, BY RESORT TO STATE LAW, OF THE CONTENT OF FEDERAL RIGHTS. THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Court of Appeals said that "the present case raises the question not of survival of the cause of action, but rather the extent and duration of that survival." 512 F.2d at 86, Slip Opinion, pp. 5234-35 (Appendix A). It had already been determined by the Fifth Circuit, in *Rogers v.*

Douglas Tobacco Board of Trade, 244 F.2d 471 (5 Cir. 1957), that a private antitrust action for actual damages survived against the personal representative of a deceased defendant. The holding in the *Rogers* case is consistent with other opinions dealing with the survival of federal private antitrust causes of action. *E.g.*, *Moore v. Backus*, 78 F.2d 571 (7 Cir. 1935); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110 (5 Cir. 1934); *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574 (2 Cir. 1916); *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*, 128 F.2d 645 (4 Cir. 1942); *Sullivan v. Assoc. Billposters & Distributors*, 6 F.2d 1000, 1012 (2 Cir. 1925); *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 (9 Cir. 1937). In *McCain v. Socony-Vacuum Oil Co.*, 64 F.Supp. 12, 14 (W.D.Mo., 1945), the Court held that a cause of action against a Clayton Antitrust Act violator survived against the parent corporation of

a subsidiary corporation which had gone bankrupt and the parent corporation had obtained the assets of the bankrupt subsidiary by distribution to it, as a creditor, by the referee in bankruptcy.

"[I]t is well-settled that, with respect to a cause of action created by act of Congress, the question of survival is not one of procedure but one which depends 'on the substance of the cause of action.' *Schreiber v. Sharpless*, 110 U. S. 76, 80 [(1883)]; *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U.S. 673, 692 [(1894)]." *Barnes Coal Corp. v. Retail Coal Merchants Ass'n, supra*, at 648.

The survivability of a federal cause of action, created by act of Congress, is not determined by state law. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 67 (1913); *Walsh v. New York, N.H. & Hartford R. Co.*, 173 Fed. 494 (D.Mass., 1909); *Van Choate v. General Electric Co.*, 245 Fed.

120 (D.Mass., 1917); *Barnes Coal Corp. v. Retail Coal Merchants Ass'n, supra,* at 648. As in all cases where there is no Congressional expression in the statute creating the cause of action, the survivability of a federal antitrust action is to be determined by an interpretation of the statute in the light of the common law and is not governed by state survival statutes or state decisions relating to the subject. *Barnes Coal Corp., supra,* at 648, citing: *Glenn Coal Co. v. Dickinson Fuel Co.,* 72 F.2d 885, 890 (4 Cir. 1934); *Sullivan v. Assoc. Billposters, etc., supra; United Copper Securities v. Amalgamated Copper Co., supra; Haskell v. Perkins,* 28 F.2d 222 (D.N.J., 1928); *Caillouet v. American Sugar Refining Co.,* 250 Fed. 639 (E.D.La., 1917); *Bonvillian v. American Sugar Refining Co.,* 250 Fed. 641 (E.D.La., 1918); *Imperial Film Exchange v. General Film Co.,* 244 Fed. 985 (S.D.N.Y., 1915). The Court

below recognized this principle when it said [512 F.2d at 86, 1975 Slip Opinions, 5th Cir., p. 5234 (Appendix A)]:

> Since the federal statute which created the appellee's right of action made no provision for abatement or survival, recourse must be had to the federal common law. *Barnes Coal Corp. v. Retail Coal Merchants Ass'n,* 128 F.2d 645, 648 (4 Cir. 1942). * * *

The Court below determined that petitioners' cause of action survived against the estate of the alleged wrongdoer, but held, without any precedential basis, that once the heirs had been put in possession of the property of the estate the petitioners' cause of action became extinguished. Rather than being based upon authority, this unique holding was based upon the absence of authority relative to the institution of a suit against heirs once the estate had been put in the possession of the heirs [512 F.2d at 87, 1975 Slip Opinions, 5th Cir., p. 5234 (Appendix A)]:

> No authority has been unearthed

> by the court below or by our own research or that of counsel for a private civil antitrust suit directly against the heirs of a decedent against whom and against the representative of whose estate no such action had been filed. We think this is of some significance, in light of the myriad cases which have considered questions of abatement and survival over more than two centuries.

The holding of the Court below is entirely inconsistent with the process of reasoning employed by a nearly unanimous Court in *DeSylva v. Ballentine*, 351 U.S. 570 (1956). The opinion of this Court in the *DeSylva* case makes the distinction between when the Federal Courts must look to state law in dealing with matters, the scope of which is prescribed by federal law.

In *DeSylva v. Ballentine, supra*, litigation was brought by the mother of an illegitimate minor child of a musical composer, who had obtained copyrights on numerous musical compositions, concerning the child's right to renew and extend the

said copyrights. The widow of the deceased composer challenged the right of the plaintiff to renew and extend the copyright and to share in the revenues accruing from the copyrights—a right wholly contingent on the federal statute creating it. We respectfully submit that the manner this Court went about resolving the question, in Part II of the opinion, is illustrative of the way federal courts should deal with matters where the Congress has created a federal cause of action depending upon an ordinary state-defined legal status. We respectfully submit that the *DeSylva* case was adequate precedent which required the Court below to refer to the law of Louisiana for a determination of the effect of the putting of the heirs in simple possession of the effects of the deceased wrongdoer's succession "without benefit of inventory."

After determining in the *DeSylva* case

that the widow and children of the deceased composer succeeded to the right of renewal of the copyrights as a class, each of whom are entitled to share in the renewal term of the copyright, this Court was called upon to determine the meaning of the word, "children," as used in the Copyright Act, § 24. The following pertinent words of the *DeSylva* opinion lead to the conclusion that the law of Louisiana should have been consulted by the Court below in determining whether and to what extent the heirs of the deceased wrongdoer were liable for the wrongful acts of their ancestor. This Court wrote (351 U.S., at 580):

> We come, then, to the question of whether an illegitimate child is included within the term "children" as used in § 24. The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. *Cf. Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 [(1946)]; *Jackson County v. United States*, 308 U.S. 343, 351, 352 [(1940)]. This is especially true where a statute deals with a familial relationship; there

> is no federal law of domestic relations, which is primarily a matter of state concern.

Inherent in the issue whether a cause of action survives the death of the wrongdoer is the question whether the cause of action is heritable. Applying the principles of federal common law, the Courts which have considered the problem have held that the cause of action survives against the wrongdoer's estate, but they have limited the recovery to actual damages since no public policy is served by penalizing the wrongdoer's successors. These cases were previously listed *ante*, pp. 11-12. The scope of the federal right is whether the cause of action survives and is heritable. The means by which things are inherited, and the conditions imposed upon the taking of a succession by the heirs, however, are matters of State law which determine the content of that which the federal law grants unto particular persons.

This is illustrated by this Court's opinion in the *DeSylva* case, wherein this Court wrote (351 U.S., at 580-581):

> * * * To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created the legal relationships. The word "children," although it to some describes a purely physical relationship, also describes a legal status not unlike the others. To determine whether a child has been legally adopted, for example, requires a reference to state law. We think it proper, therefore, to draw on the ready-made body of state law to define the word "children" in §24. This does not mean that a State would be entitled to use the word "children" in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of "children" we deem state law controlling. * * * (Citation omitted.)

The Court below determined that a change in a legal status of respondent, *i.e.*, the conversion from personal representative of the deceased wrongdoer to the heir of that person, extinguished the cause of action. The Court below did not

once refer to the law of the State of Louisiana, which controlled and permitted the very existence of the legal relationships the change of which the Court below determined to have such onerous consequences for the petitioners herein. There is no federal law of successions and of distribution of estates to heirs. There appears to be no good reason for refusing to look at the law of the State which created the said legal relationships in order to ascertain precisely the nature of those relationships and the conditions imposed by State law upon the change of relationships. There is no discernible logical basis for rejecting the *DeSylva* rationale in matters of the extent of survival of federal causes of action once it is determined that such causes of action do survive and are heritable. The law of Louisiana created the legal relationship which existed between the deceased

and the administrator of his estate, as well as the legal relationship between him and his heirs. It is wholly inconsistent to permit a federal cause of action to abate upon the change in a state-created legal relationship without at least looking at the law of the State to ascertain the conditions and obligations imposed upon this change in legal relationships. Had Louisiana law been consulted in this matter, the result would have been different. Louisiana law is quite clear on the matters herein involved.

Under Revised Civil Code, articles 1013, 1056 and 1423, the possessors of an estate are made capable of being sued for wrongs done by the person whose estate they have accepted. Like the common law rule which prevents a claimant from suing upon a cause of action which is penal in nature and purely personal between the wrongdoer and the person wronged (*e.g.*,

Barnes Coal Corp. v. Retail Coal Merchants Ass'n, supra; Rogers v. Douglas Tobacco Board of Trade, supra—each of which limited a representative's right of recovery to the amount of actual damages), Louisiana law imposes similar restrictions (Art. 428, Louisiana Code of Civil Procedure), as does virtually every other state jurisdiction [*see* Note, "Survival of Actions Brought Under Federal Statutes," 63 Col.L.Rev. 290, at n. 8, pp. 290-291 (1963)].

The relevant Louisiana statutes were set forth, *ante*, pp. 5-7, in the section of this Petition entitled "Statutory Provisions Involved." Those provisions of State law are felt to be of such importance to this case, however, that they are incorporated in this argument in support of the issuance of the writ of certiorari herein.

Article 1013, La.C.C., provides:

> The effect of the simple acceptance of the succession, whether express or tacit, is such, that when

made by an heir of age, it binds him to the payment of all debts of the succession, not only out of the effects which have fallen to him from the succession, but even personally, and out of his own property, as if he had himself contracted the debts or as if he was the deceased himself; unless, before acting as heir, he make a true and faithful inventory of the effects of the succession, as here above established, or has taken the benefit treated of hereafter.

The "benefit of inventory" is defined in Article 1032, La.C.C., as follows:

> The benefit of inventory is the privilege, which the heir obtains, of being liable for the charges and debts of the succession only to the value of the effects of the succession, by causing an inventory of these effects to be made within the time and in the manner hereinafter prescribed.

Article 1054, La.C.C., provides:

> The effect of the benefit of inventory is that it gives the heir the advantage:
>
> 1. Of being discharged from the debts of the succession by abandoning all the effects of the succession to the creditors and legatees;
>
> 2. Of not confounding his own effects with those of the succession, and of preserving against it the right of claiming the debts due on him from it.

Article 1056, La.C.C., provides:

> If * * * the beneficiary heir declares that he accepts the succession simply, all the effects which compose it must immediately be delivered to him, but then he becomes responsible for the debts of the succession, not only to the amount of the effects thereof, but personally and out of his own property, and the creditors of the deceased can obtain judgment against him.

And finally, Article 1423, La.C.C., provides:

> The heirs by the fact alone of the simple acceptance of a succession left them, contract the obligation to discharge all the debts of such succession, to whatever sum they may amount, though they far exceed the value of the effects composing it.
>
> The only exception to this rule is when the heirs, before meddling with the succession have caused a true and faithful inventory thereof to be made, as is prescribed in the section of this title which relates to the *benefit of inventory;* for in this case they are only bound for the debts to the amount of the value of the effects found in the succession. (Italics in original.)

Thus, Louisiana law is clear that an heir who accepts possession of an estate without claiming the "benefit of inventory,"

takes with the succession the debts and liabilities of the succession as well as its assets, just "as if he had himself contracted the debts or as if he was the deceased himself." When the heirs do not cause an inventory to be made of the succession property and they do not declare that they take their inheritance "with the benefit of inventory," they take the succession on the legal condition that they are liable for every debt or liability of the succession, "though [the debts and liabilities] far exceed the value of the effects composing it." Article 1423, La.C.C. Louisiana law imposes upon an heir who takes simple possession of his inheritance the legal relationship to the creditors of the estate as a "guarantor" of the debts and liabilities of the estate, "to whatever sum they may amount, though they far exceed the value of the effects composing it." *Ibid.*

So while the federal common law was the proper basis for determining the survivability of a federal cause of action, the inquiry after this determination was appropriately directed to the law of the State of Louisiana relative to the conditions under which the heirs took possession of their ancestor's property. These conditions determined the "content" of the federal right, just as the California law relative to illegitimate children controlled the "content" of the right of renewal created by the Copyright Act, §24, as construed by this Court in *DeSylva v. Ballentine, supra.*

The Perez heirs were well versed in the conditions of the Louisiana law of succession and distribution. Leander H. Perez, Jr. and Chalin O. Perez are both prominent attorneys in the State of Louisiana. Being aware of the conditions imposed upon their taking possession of

the succession's effects without benefit of inventory, they elected to so take it even after there had been an administration of the succession and the remainder of the property of the estate (after payment of all ordinary debts) had been surveyed and its magnitude ascertained.

The opinion of the Court below will work untold injustices in matters of the fair administration of the federal common law of survival of actions. Louisiana cannot be alone in its provision for the heirs to declare they accept the succession simply and to thereby cause immediate delivery of all the effects which compose the succession. Article 1056, La.C.C. Under the terms of the decision made in this case by the Court below, the entire body of federal common law, which has developed the principle that a cause of action for actual damages survives the death of the wrongdoer, is in jeopardy.

E.g., Barnes Coal Corp. v. Retail Coal Merchants Ass'n, supra; Sullivan v. Assoc. Billposters, etc., supra; Rogers v. Douglas Tobacco Board of Trade, supra. In the case *sub judice*, that body of law has been thwarted and rendered effete.

Under the terms of the decision below, all an heir need do, when his ancestor dies with a substantial estate with relatively minor debts and liabilities which are enforceable under state law but with a major liability under a federal statute, is declare that he accepts the succession simply and the entire federal cause of action is thereby extinguished. The Court below, in its attempt to justify what it had done in this case, said that even though it recognized the trend of the federal common law of survival of actions to favor the survival of causes of action not personal to the decedent it would use the approach of determining what would be "reasoned

justice." Its result was not just, though, for it not only precluded petitioner's substantial claim against the heirs of a man who had obtained great local political power and who had used that power to amass a fortune, but, as a precedent, it will totally negate the survival of federal causes of action in states such as Louisiana where the law of successions permits an heir to take immediate possession of the effects of a succession. It was the law of Louisiana which created the procedure for the heirs to take possession without benefit of inventory, conditioned upon the acceptance, too, of all the liabilities of their ancestor. Those conditions should not have been disregarded by the Court below any more than was the condition under California law for including an illegitimate child within the class of persons entitled to succeed to the right to renew and extend copyrights, authorized

by federal statute, overlooked by this Court in *DeSylva v. Ballentine, supra.*

The *DeSylva* case provides clear authority for reaching into state law to discover the content of a federal right once it is determined that the legal status upon which the federal law depends does in fact exist. Those guidelines were not followed by the Court below. The opinion of the Court below thus so far departed from the usual course of ascertaining the content of federally created rights of action which are linked with state-created legal relationships that the exercise of this Court's power of supervision should be impelled.

There was no dispute over the Trial Court's exercise of its discretion to grant leave to amend the suit to name Leander H. Perez, Jr., individually, after he had been named in the capacity as administrator in the original pleadings.

If the cause of action survived beyond the distribution of the effects of the succession, as we submit it did, then the amendment and its relation back to Leander H. Perez, Jr., was wholly proper. Rule 15(a), (c), F.R.C.P. *Loudenslager v. Teeple*, 466 F.2d 249 (3 Cir. 1972); *Travelers Indemnity Co. v. U.S. ex rel. Construction Specialties Co.*, 382 F.2d 103 (10 Cir. 1967); *Brennan v. Estate of Smith*, 301 F.Supp. 307 (M.D.Pa., 1969); *Newman v. Freeman*, 262 F.Supp. 106 (E.D.Pa., 1966). The District Court properly ordered an evidentiary hearing to determine whether the remaining heirs had notice of the pendency of the action and other factors essential to make the amendment relate back to the date of the original complaint. *See* Rule 15(c), F.R.C.P. The District Court's judgment was entirely correct and should be reinstated.

CONCLUSION

For these reasons, a writ of certio-

rari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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E. J. LEE and Lee Boats, Inc., Plaintiffs-Appellees,

v.

VENICE WORK VESSELS, INC., et al., Defendants, Leander H. Perez, Jr., Defendant-Appellant.

No. 74-3172.

United States Court of Appeals, Fifth Circuit.

April 25, 1975.

Plaintiffs instituted private civil antitrust action for treble damages against heirs of alleged wrongdoer. The United States District Court for the Eastern District of Louisiana, Edward J. Boyle, Sr., J., denied motion to dismiss filed by one heir who had acted as administrator at the alleged wrongdoer's estate and withheld ruling on motion of other three heirs to dismiss pending evidentiary hearing. The first heir appealed with permission. The Court of Appeals, Kraft, District Judge, held that plaintiffs' cause of action did not survive against heirs of alleged wrongdoer where suit had been instituted long after alleged wrongdoer's death and after his estate had been administered and distributed among his heirs and administrator of his estate had been released.

Reversed with directions.

Abatement and Revival ⇐52

Private cause of action for treble damages under antitrust laws did not survive against heirs of alleged wrongdoer where suit had been instituted long after alleged wrongdoer's death and after his estate had been administered and distributed among his heirs and administrator of his estate had been released. Clayton Act, §§ 4, 5(b), 15 U.S.C.A. §§ 15, 16(b); 28 U.S.C.A. §§ 1292(b), 2404.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM and DYER, Circuit Judges, and KRAFT, District Judge.

KRAFT, District Judge.

The question for determination in this case, before this Court on an interlocutory appeal[1] for which leave was granted, is whether a private cause of action for treble damages[2] under the antitrust laws survives against the heirs of an alleged wrongdoer, where the suit was instituted long after the decedent's death and after his estate had been administered and distributed among his heirs and the administrator of his estate had been released. We conclude it does not.

The United States instituted a civil antitrust action against a number of defendants, including Leander H. Perez, Sr. (Perez, Sr.) on November 6, 1967, asserting unlawful conduct on his part in 1965. Perez, Sr. died March 19, 1969. Letters of Administration on his estate were issued on April 24, 1969 to his son, Leander H. Perez, Jr. (Administrator). The suit by the United States against Perez, Sr. was dismissed on May 7, 1969, but continued against the remaining defendants. On November 24, 1971 the administration of the estate of Perez, Sr. was concluded, the heirs were put in possession and the Administrator was released. On April 10, 1972 the United States action against the remaining defendants was terminated by the entry of a final consent decree.

Appellees, on December 29, 1972, filed a private civil antitrust action for treble damages naming "Leander H. Perez, Jr. Administrator of the Estate of Leander H. Perez, Sr." as one of several defendants. Following a motion to dismiss on the ground that there was no longer an administrator in being, appellees, with leave of court, amended the complaint on December 31, 1973 by adding the four heirs, including Perez, Jr., as defendants. Upon the heirs' motion to dismiss the court below denied the motion of Perez, Jr. and withheld ruling on the motion of the other three heirs pending an evidentiary hearing. Perez, Jr., with requisite permission, has appealed.

Since the federal statute which created the appellees' right of action made no provision for abatement or survival, recourse must be had to the federal common law. Barnes Coal Corp. v. Retail Coal Merchants Ass'n (4 Cir. 1942), 128 F.2d 645, 648. It will be noted that 28 U.S.C. § 2404 provides that a civil action for damages by the United States shall not abate on the death of a defendant, but shall survive and be enforceable *against his estate*. No provision is made for survival or enforcement beyond that. The silence of Congress on abatement and survival of private civil antitrust actions cannot be reasonably construed to indicate an intent to extend to private antitrust plaintiffs a greater right, in respect of survival of the cause of action, than is accorded the United States.

This Court, in Rogers v. Douglas Tobacco Board of Trade (5 Cir. 1957), 244 F.2d 471 held that a private antitrust action survived against the personal representatives of a defendant who died after service of process upon him. Neither this decision nor 28 U.S.C. § 2404 affords any real guidance to the solution of the present problem, since the statute contemplates and the decision deals with the death of a defendant against whom an action is already pending.

No authority has been unearthed by the court below or by our own research or that of counsel for a private civil antitrust suit directly against the heirs of a decedent against whom and against the representative of whose estate no such action had been filed. We think this is of some significance, in light of the myriad cases which have considered questions of abatement and survival over more than two centuries.

We are mindful that "[t]he common law is not a static but a dynamic and growing thing. Its rules arise from the application of reason to the changing conditions of society. It inheres in the life of society, not in the decisions interpreting that life; and, while decisions are looked to as evidence of the rules, they are not to be construed as limitations upon the growth of the law but as landmarks evidencing its development." Barnes Coal Corp. v. Retail Coal Merchants Ass'n, supra (128 F.2d p. 648). Many of the cases in the development of survival of actions at the common law resulted from efforts to lessen or avoid the harsh and unjust effects of the abatement of a cause of action upon the death of the wrongdoer. In this context it may be fairly said, we think, that the quest has been for reasoned justice. This does not necessarily entail an unending expansion without concern for its consequences. Under existing law, the present case raises the question not of survival of the cause of action, but rather the extent and duration of that sur-

1. 28 U.S.C. § 1292(b), Rule 5, Federal Rules of Appellate Procedure.

2. 15 U.S.C. § 15.

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vival. Here, in an effort to achieve reasoned justice, we think it essential to weigh and balance the interests of the appellees against those of the heirs whom the appellees now seek to hold accountable.

We are not persuaded by appellees' argument that it would be inherently unfair to deny them the right to sue the heirs of Perez, Sr., since it was the appellees' own inaction which caused their present problem. Appellees may well have confused the effect of the suspension of the statute of limitations [3] during the pendency of and for one year after the termination of the suit by the United States with the survivability of their cause of action. They urge, without warrant, that the suspension of the limitations' statute enabled them to remain inactive with impunity, so long as their suit was brought before its expiration. The suspension provision does not necessarily achieve that result. It only extends the time during which suit may be brought against the alleged wrongdoer or against those as to whom, upon his death, the cause of action survived under the federal common law.

The appellees were aware both of the suit by the United States and of the death of Perez, Sr. Though the four year statute of limitations was tolled until and for one year after the entry of the final consent decree against the surviving defendants on April 10, 1972, nothing precluded appellees from instituting their action against Perez, Sr. before his death or, thereafter, against the Administrator during the administration of his estate, which began April 24, 1969 and ended November 24, 1971. Appellees filed no claim in the administration of the estate nor did they oppose the release of the Administrator. Their suit against the Administrator some thirteen months after his release indicates the degree of appellees' inattention and their unwarranted assumption that the administration of the estate was still in progress, though a simple search of the appropriate state court record would have disclosed otherwise. Appellees' persistent failure to exercise their claimed rights despite ample opportunity justifies neither their claim of inherent unfairness nor warrants an extension of the survival of their cause of action beyond the Administrator to the heirs.

In contrast, appellees now seek to call upon the heirs to prepare for and defend against a claim that Perez, Sr., from 1965 until his death in May, 1969, conspired with others to restrain interstate trade and commerce and to establish a monopoly, though the heirs are not alleged to have participated in the alleged unlawful conduct. Unless the heirs were disposed to permit the evidence of appellees to go unchallenged, they must, of necessity and long after the events complained of, seek to discover and establish acts and statements of Perez, Sr., now dead six years, which tend to or do disprove or affirm allegations of the participation of Perez, Sr. in the asserted conspiracy.

Had Perez, Sr. been sued or had the Administrator been sued before the completion of the administration of the estate and his discharge the assets of the estate, undiminished by federal estate taxes or by state inheritance or death taxes, would have been available in the event of recovery of damages by the appellees. Now, the net assets of the estate, necessarily smaller in amount, have been distributed. If appellees' cause of

3. 15 U.S.C. § 16(b).

action were to be held to survive against the heirs, could each heir be held liable only to the extent of that heir's net inheritance; or, if not, to what extent? Could the heirs be held liable jointly or severally? If the heirs' respective inheritances have been commingled with their own assets in such fashion as to make identification of the inheritance impossible or if such inheritances shall have been wholly or partially expended or encumbered or diminished in value by events or the passage of time, to what degree could each heir be called upon to respond to any recovery? These self-evident problems, and others, difficult of just solution, which would be created by extending survival of the cause of action beyond the Administrator to the heirs reminds us, somehow, of the fabled end of "Humpty-Dumpty".[4] All could have been avoided by appellees' attention to the exercise of their rights. All furnish, we think, sound reason for holding that the survival of appellees' cause of action terminated upon the distribution of the estate to the heirs and the release of the Administrator. Any different conclusion would not be reasoned justice to the heirs.

Accordingly, we determine that the appellees' cause of action was improperly asserted against the heirs of Perez, Sr. and reverse the order of the court below, with directions to grant the motion for dismissal by the defendant, Leander H. Perez, Jr. and to act upon the motions of Chalin O. Perez, Joyce Perez Gelpi and Betty Perez Carrere consistently with this opinion.

Reversed and remanded.

4. "Humpty-Dumpty sat on a wall
Humpty-Dumpty had a great fall
All the King's horses
And all the King's men
Couldn't put Humpty-Dumpty together again."

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

E. J. LEE, ET AL NO. 72-3409

VERSUS CIVIL ACTION

VENICE WORK VESSELS, INC., ET AL. SECTION D

MEMORANDUM OPINION AND ORDER

William L. Crull, III., Esq.
Attorney for Plaintiffs

Sidney A. Provensal, Esq.
Attorney for Defendants

BOYLE, District Judge:

Plaintiffs filed their antitrust complaint on December 29, 1972, naming in addition to other defendants, "Leander H. Perez, Jr., Administrator of the Estate of Leander H. Perez, Sr." Service of the complaint on January 30, 1973 was followed by motions for extension of time to answer submitted by "Leander H. Perez, Jr., Administrator of the Estate of Leander H. Perez, Sr." filed on February 13 and March 14, 1973. On April 18, 1973 "Leander H. Perez, Jr., Administrator of the Estate of Leander

H. Perez, Sr." moved this Court to dismiss the complaint "against said defendant because the complaint fails to state a claim against said defendant upon which relief can be granted; and in the alternative for a summary judgment on the grounds that there is no such defendant." With this motion to dismiss the defendant filed an "Excerpt of the Judgment of Possession of the Estate of Leander Perez, Sr." rendered on November 24, 1971 to show that the estate was no longer under administration and that there was no such person as "Leander H. Perez, Jr., Administrator of the Estate of Leander H. Perez, Sr." On June 20, 1973 the defendants' motion was continued without date and leave was granted to the plaintiffs to amend their compalint [sic], which plaintiffs did, but not until more than six months later when, on December 31, 1973, they added as defendants Leander H. Perez, Jr. (individually), Chalin O. Perez, Joyce Perez Gelpi and Betty Perez Carrere,

all children and heirs of Leander H. Perez, Sr.

These defendants now move to dismiss the plaintiffs' complaint against them on the following grounds:

1. The claim of plaintiffs, not being based upon any written evidence, should be dismissed because of the Louisiana "Deadman's Statute," 13:3721:[1/]

1/ §3721. Parol Evidence to prove debt or liability of deceased person; objections not waivable

Parol evidence shall not be received to prove any debt or liability of a deceased person against his succession representative, heirs, or legatees when no suit to enforce it has been brought against the deceased prior to his death, unless within one year of the death of the deceased:

(1) A suit to enforce the debt or liability is brought against the succession representative, heirs, or legatees of the deceased;

(2) The debt or liability is acknowledged by the succession representative as provided in Article 3242 of the Code of Civil Procedure, or by his placing it on a tableau of distribution,

or petitioning for authority to pay it;

(3) The claimant has opposed a petition for authority to pay debts, or a tableau of distribution, filed by the succession representative, on the ground that it did not include the debt or liability in question; or

(4) The claimant has submitted to the succession representative a formal proof of his claim against the succession, as provided in Article 3245 of the Code of Civil Procedure.

The provisions of this section cannot be waived impliedly through the failure of a litigant to object to the admission of evidence which is inadmissible thereunder. As amended Acts 1960, No. 32, § 1.

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2. The heirs of Perez, Sr. cannot be held liable because the antitrust laws do not provide for survivorship of the cause of action.
3. The statute of limitations, 15 U. S.C. 15b, bars the claim of the plaintiffs.
4. If the statute of limitations does not bar the plaintiffs' claim, the equitable doctrine of laches should apply.

The matter was heard by the Court on a prior day and was taken under submission.

The complainants allege that Leander H. Perez, Sr., and other defendants herein, did conspire to and did restrain trade and commerce in violation of the antitrust laws to the damage and loss of the complainants. On November 6, 1967, the United States filed an antitrust suit, Civil Action No. 67-1673 (E.D.La.) against Perez, Sr. and defendants herein, Venice Work Vessels, Inc., Luke A. Petrovich, Thomas Popich and also Warren J. O'Brien. This private action is predicated on allegations similar to those in the Government's suit. Perez, Sr. died on March 19, 1969. His succession was opened on April 24, 1969. The movers were recognized as the children and heirs of the decedent and were put into possession of his estate and the administrator was discharged on November 24, 1971.

On April 10, 1972 the Honorable Jack

M. Gordon signed and entered a final consent judgment[2/] in the government antitrust suit, recalling and vacating the consent decree dated March 9, 1972 which was signed by the Honorable James A. Comiskey.

2/ The judgment recites that notice of Perez, Sr.'s death was filed in the case on May 7, 1969 and Perez, Sr. ". . . is therefore no longer a defendant. . . ."

The threshold inquiry to be made is whether the suit was filed timely. 15 U.S. C. 16(b) provides:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A [§ 15a of this title], the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall

be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 [§ 15 of this title] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." (Emphasis ours.)

The present suit was filed on December 29, 1972, well within the one year period of suspension provided by 15 U.S.C. 16(b).

The Perez defendants contend that the death of Leander H. Perez, Sr. abates plaintiffs' cause of action against them. Their contention is that an antiturst [sic] cause of action does not survive the death of the alleged wrongdoer. We find that cause of action does not abate to the extent

that actual damages might be recovered but we find that the plaintiffs' cause of action to the extent that it seeks treble damages has abated. Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471, 483 (5 Cir. 1957).

Under 15 U.S.C. 16(b) the plaintiffs had one year after the entry of the consent decree in the action by the United States, or until April 10, 1973, to institute this suit. By that date Perez, Sr. would have been deceased slightly more than four years and was dead three years and eight months when this suit was filed on December 29, 1972. Perez, Jr. would have been discharged as administrator of this father's estate nearly one year and four months by April 10, 1973 when the statute of limitations would have run and had been already discharged over one year when this action was filed.

Having concluded that the plaintiffs' action did not abate on the death of Leander H. Perez, Sr., we find that the plaintiffs'

suit is not barred by the statute of limitations since the filing of the complaint on December 29, 1972 was well within one year of the entry of the consent decree in Civil Action No. 67-1623. We also conclude that the statute of limitations was suspended until the entry of the consent decree even against Perez, Sr., who died during the pendency of the government antitrust suit. Sullivan v. Associated Billpasters [sic] & Distributors, 6 F.2d 1000, 42 A.L.R. 503 (2 Cir. 1925); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 337, 91 S.Ct. 795, 805, 28 L.Ed.2d 77 (1971).

We conclude that the action is properly asserted against the heirs of Leander H. Perez, Sr. Although we are aware of no case in which an antitrust cause of action was asserted against heirs of a decedent, we think that the fact that Perez, Sr.'s administrator has been discharged and the heirs are in possession of the decedent's

estate should not affect the plaintiffs' right to claim actual damages for the alleged illegal activities of Leander H. Perez, Sr. See Banana Distributors, Inc. v. United Fruit Company, 27 F.R.D. 403 (S.D. N.Y. 1961); Vandervelde v. Put and Call Brokers and Dealers Association, 43 F.R.D. 14 (S.D. N.Y. 1967), and Rogers v. Douglas Tobacco Board of Trade, supra.

We come now to the issue of the effect of naming the decedent's succession representative as a defendant at a time when no such representative existed. The suit filed on December 29, 1972 naming "Leander H. Perez, Jr., Administrator of the Estate of Leander H. Perez, Sr." as a defendant unquestionably gave notice to Leander H. Perez, Jr., individually, that he was being sued for the alleged violation of the antitrust laws by his father. The amendment of the complaint on December 31, 1973 adding Leander H. Perez, Jr., individually, relates back to December 29,

1972 since the claim asserted arose out of the occurrence set forth in the original petition, i.e., the alleged illegal activities of his father. See Rule 15(c), F. R.C.P., Loudenslager v. Teeple, 466 F.2d 249 (3 Cir. 1972). There is no doubt that Leander H. Perez, Jr. had notice of the suit within the period of limitations and we conclude that he will not be prejudiced in maintaining his defense and that he knew or should have known that, but for a mistake concerning his representation of his father's succession, the action would have been brought against him. Welch v. Louisiana Power & Light Company, 466 F.2d 1344 (5 Cir. 1972).

With respect to the question of relation back to the date of the filing of the original complaint of the claims by plaintiffs against Chalin O. Perez, Joyce Perez Gelpi and Betty Perez Carrere, the record here, as in Welch, supra, does not disclose

whether the notice requisites of Rule 15(c) have been satisfied. Such fact determination can only be made in an evidentiary hearing.

We find no merit in the movers' contention that the "Louisiana Deadman's Statute", [sic,] requires dismissal of the plaintiffs' claim. That statute is found in Part II, Chapter 17, of Title 13 of the Louisiana Revised Statutes. Chapter 17, Part II, is entitled "Evidence in General." The admissibility of evidence in Federal Courts in this, as in other civil suits, is governed by Rule 43(a), F.R.C.P. Although the rule is slanted toward admissibility, rather than rejection, of evidence, if state law excludes the evidence and no federal rule or statute admits it, the evidence must be rejected. Atlantic Coast Line R. Co. v. Dixon, 207 F. 2d 899 (5 Cir. 1953).

The argument of movers raises an evidentiary issue. We are not aware of how plaintiffs intend to prove their allegations.

If parol evidence should be offered on trial, on objection timely made the Deadman's Statute may be urged in support of its exclusion. But it would be improper to dismiss this action at this time merely because of its provisions.

The defendants' contention that the equitable doctrine of laches should apply to this antitrust suit is also without merit. The rights asserted by plaintiffs are enforceable only at law and we are bound by the statute of limitations provided in 15 U.S.C. 16(b). Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F.Supp. 258, 298, vacated on other grounds, 377 F.2d 776, aff'd in part, rev'd in part, on other grounds, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1176, rehearing denied, 393 U.S. 901, 89 S.Ct. 64 (1968)

Accordingly, the motion of the defendant, Leander H. Perez, Jr., should be, and the same is hereby, DENIED.

Determination of the motion of the

defendants, Chalin O. Perez, Joyce Perez Gelpi and Betty Perez Carrere, must await an evidentiary hearing on the issue of Rule 15(c) notice. Counsel for the parties shall confer with the Court with regard to selection of a hearing date.

s/ Edw. J. Boyle, Sr.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana

June 28, 1974

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

*** ***
*** August 18, 1975 ***

TO ALL COUNSEL OF RECORD

No. 74-3172 - E. J. Lee & Lee Boats, Inc. vs. Venice Work Vessels, Inc., et al.; Leander H. Perez, Jr.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

by s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Sidney W. Provensal, Jr.
Messrs. F. Irvin Dymond
William L. Crull, III

* * *

APPENDIX C

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of November, 1975, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. Sidney W. Provensal, Jr., *Esq.*, PROVENSAL & FITZMAURICE, 611 Whitney Building, New Orleans, Louisiana 70130, Counsel for Respondent, and that all parties required to be served have been thus served this date.

F. IRVIN DYMOND
Attorney at Law

Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

NO. 75-7411

In the Supreme Court of the United States

OCTOBER TERM, 1975

E. J. LEE & LEE BOATS, INC.,
Petitioners,

versus

VENICE WORK VESSELS, INC., ET AL.,
LEANDER H. PEREZ, JR.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES CITED

IN THE
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Petitioners have altered the question presented for decision. The United States Court of Appeals for the Fifth Circuit properly stated the question presented as:

> "The question for determination in this case, before this Court on an interlocutory appeal for which leave was granted, is whether a private cause of action for treble damages under the antitrust laws survives against the heirs of an alleged wrongdoer, where the suit was instituted long after the decedent's death and after his estate had been administered and distributed among his heirs and the administrator of his

estate had been released."

Lee v. Venice Work Vessels, Inc., 512 F. 2d 85.

If this Honorable Court were to grant certiorari, there would be an additional question presented to this Court. That question is whether a federal civil antitrust action abates upon the death of the alleged "wrongdoer" when neither he nor his estate benefitted by such action. The Court of Appeals did not have to reach this question and did not.

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit properly summarized the facts relative to the issues. In addition to those facts quoted by petitioners in their STATEMENT OF THE CASE, the Court of Appeals noted additional facts which were important in its determination. These facts dealt with petitioners' complete inattention to "the exercise of their rights". The father of respondent died on March 19, 1969 and his estate was promptly opened with Letters of Administration being issued on April 24, 1969. Two years and seven months later, on November 24, 1971, the Administrator was released and the heirs placed in possession. Petitioners' complaint against Leander H.. Perez, Jr. as Administrator of the Estate of Leander H. Perez, Sr. was not filed until December 29, 1972. During this period of time, petitioners did not file any claim against the estate. The Court of Appeals found on Page 87 as follows:

> "The appellees were aware both of the suit by the United States and of the death of Perez, Sr. . . . Appellees filed no claim in the administration of the estate nor did they oppose the release of the Administrator. Their suit against the Administrator some thirteen months after his release indicates the degree of appellees' inattention and their unwarranted assumption that the administration of the estate was still in progress, though a simple search of the appropriate state court record would have disclosed otherwise. Appellees' persistent failure to exercise their claimed rights despite ample opportunity justifies neither their claim of inherent unfairness nor warrants an extension of the survival of their cause of action beyond the Administrator to the heirs."

ARGUMENT

The decision of the Court of Appeals has not departed from the accepted and usual course of judicial proceedings and petitioners' claim of conflict of decisions is spurious. Petitioners cite *Rogers v. Douglas Tobacco Board of Trade*, 244 F. 2d 471 (5th Cir. 1957), as authority for such departure and conflict. The court below stated that such case "held that a private antitrust action survived against the personal representative of a defendant who died after service of process upon him". The Court further stated that that "decision deals with the death of a defendant against whom an action is already pending". The title of the case clearly shows that it was a proceeding

against the Administrator and Administratrix of the estate of the deceased defendant.

The *Rogers* case and all of the other cases cited by petitioners were not complaints initially filed against an heir. All of those cases dealt with substitution of the personal representative of a deceased defendant.

Petitioners only cite one authority that was not cited to the Court of Appeals and that is the case of *DeSylva v. Ballentine*, 35 U.S. 570, 100 L.Ed. 1415, 76 S.Ct. 974. (1956).

Petitioners contend that that case is authority for using the state law of Louisiana to permit them to sue an heir in the federal court on a federal cause of action. *DeSylva* was a copyright case and the court had to determine what was meant in the federal statute when it referred to "children" as having certain rights. This Honorable Court looked to the state law for a definition of "children".

Obviously, in the case before this Honorable Court, we are not concerned with the definition of the word "heir", we are only concerned whether the antitrust law survives against the heir where suit was instituted long after the estate had been administered and its assets distributed to the heir and the Administrator released.

If the federal antitrust law provided that civil actions survived as to the heirs of a deceased wrongdoer, then this Court would have to define the word "heirs", but the federal antitrust statute does not so provide.

It should also be noted that this Honorable Court in *DeSylva* was very careful to state that it would not always look to state law even for definitions. The Court said on Page 582:

> "This does not mean that a State would be entitled to use the word "children" in a way entirely strange to those familiar with its ordinary usage, but at least to the extent that there are permissible variations in the ordinary concept of "children" we deem state law controlling."

In the *Spearman v. Spearman* case, 482 F. 2d 1203 (5th Cir. 1973), the Court said that *DeSylva v. Ballentine* "held that federal courts should look to state law *in defining* terms describing familial relations". (Emphasis Added)

In the instant case, the word "heir" is not used so there is no need to look to Louisiana law for a definition of this term.

Thus, petitioners' claims of conflict of decisions and departure from accepted and usual course of judicial proceedings collapses.

Nor is there an important question of federal law which has not been and should be decided by this Honorable Court. But more than that, the decision below is in full accord with the principals expressed in decisions of this Honorable Court.

As early as 1848, this Honorable Court decided that survival depends upon the federal or common law, not state law.

and that where there is survival, it is against the executor of the estate of the deceased. In *United States v. Daniel*, 6 How. 11, 12 L. Ed. 323, this Court said:

> "If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the *executor.*" (Emphasis Added).

The Court of Appeals below properly held with more than sufficient authority that the federal statute which created petitioners' right of action made no provisions for abatement or survival and, therefore, recourse could only be had to the federal common law.

The federal common law does not provide for survival for actions arising ex delicto for wrongs committed when neither the wrongdoer nor his estate benefitted. *Sullivan v. Associated Billposters and Distributors*, 6 F. 2d 1000 (2nd Cir. 1925).

Sullivan quoted from 3 Blackstone's Comm. 302 as follows:

> "The death of either party is at once an abatement of the suit. And in actions merely personal, arising ex delicto (from wrong done), for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is

> that actio personalis moritur cum persona (a personal action dies with the person); and it shall never be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury."

Sullivan and all of the other authorities hold that even when an action survives, it only survives against the personal representatives, such as executors or administrators of the estate of the deceased.

The Court in *Sullivan* at Page 1003 of 6 F. 2d said:

> "The courts of equity recognized the injustice of the abatement of a suit by the death of a party. In Clarke v. Mathewson, 12 Pet. 164, 171, 9 L.Ed. 1041, Judge Story called attention to the difference between a suit in equity and an action at law because of the death of a party; and as a general rule the maxim "actio personalis moritur cum persona" has not applied to cases falling within the jurisdiction of equity, and equitable remedies exist to the same extent *against executors and administrators* as they did against the decedent. Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663; Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Harrigan v. Gilchrist, 121 Wis. 127, 99 N.W. 909. This explains why it is that in suits for infringement of patents, trademarks, and copyrights, where injunctions are sought and claims are made,

the suits survive in favor of and against *personal representatives.*" (Emphasis Added)

We particularly emphasize that the federal law even prohibits the substitution of an heir for a deceased party defendant after the estate has been administered. Federal Code of Civil Procedure, Rule 25 (a), adopted 28 USC §778, which was repealed when Rule 25(a) was adopted. That statute clearly provided that upon the death of a party only his executor or administrator could be substituted.

As further concrete evidence that it is the intention of Rule 25(a) to substitute only the succession representative, we call the Court's attention to the Notes of the Advisory Committee on Rules. Note 1 states that the "first paragraph of Rule 25(a) is based upon Equity Rule 45 (death of party-revivor) and 28 USC § 778 (death of parties; substitution of executors, administrators)".

The Notes pertaining to the 1963 Amendment of Rule 25 (a) (1) provides as follows:

> "A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("The court may order") it may be denied by the court in the exercise of a sound discretion *if made long after the death*-as can occur if the suggestion of death is not made or is delayed-and circumstances have arisen rendering it unfair to allow substitution. Cf. Anderson v. Yungkau, supra, 329 U.S. at 485, 486, 67 S.Ct. at

> 430, 431, 91 L.Ed. 436, where it was noted under the present rule that *settlement and distribution of the estate of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule.* Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute." (Emphasis Added)

Certainly, if an heir can not be substituted for a deceased *party* defendant, then clearly, an heir can not be sued initially.

It should also be noted that the federal law provides that a civil action for damages by the United States shall not abate upon the death of a defendant but shall survive and be enforceable *against his estate.* (Emphasis added) 28 USC § 2404. Certainly, if the United States can not sue an heir, then a private citizen can not do so. The Court of Appeals properly agreed with this statement.

Petitioners pray this Court to give them, if there be judgment in their favor, not only the property of the deceased which the heirs inherited, but also the property of the heirs which they earned or may have inherited from someone other than the deceased. Petitioners cite the Louisiana Succession Law which does provide that if the heirs take possession without benefit of inventory, then everything that they may own is subject to judgment. Petitioners fail to mention

to the Court that the heirs only take possession of the estate without benefit of inventory when it is clear from the claims made within the period of time set forth in the law that the assets of the estate exceed the liabilities. Here the debts of the succession were minimal amounting to only unpaid current accounts. Under Louisiana law, this claim and any others prescribed long prior to the putting into possession.

Petitioners, as the Court of Appeals held, were well aware of the death of respondent's father and made no claim, formal or informal, against the estate during its two years and seven months of administration nor did they for an additional thirteen months thereafter. Nor did petitioners oppose the discharge of the Administrator as they could have under Louisiana law.

In short, petitioners ask this Court to apply some of Louisiana law but not the laws of prescription and other laws which together form the entire basis and reasoning behind the Succession Law of Louisiana. This is not really important in view of the clear authority that Federal Statutory and common law must be applied, not state law. Under the Federal Statutory laws, the federal common law,and the federal jurisprudence, an heir can not be sued initially particularly after the administration has been completed and the assets distributed.

The statement by petitioners on Page 30 of their petition that respondent's father used great legal political power "to amass a fortune" is not only untrue, but counsel for petitioners well know the untruthfulness of such statement. They, after receipt of the motion to dismiss the administrator on

on the grounds that the administration had been closed, then finally decided to look at the succession proceedings and determined its net worth and sum.

The Court of Appeals properly held that this action did not survive against the heirs particularly in this case where the suit was instituted long after the decedent's death and after his estate had been administered and distributed among his heirs and the administrator released. The Court further properly found that even if it looked to reasoned justice. petitioners' persistent failure to exercise their claimed rights, despite ample opportunity, did not warrant an extension of the survival of their cause of action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that three copies of the above and foregoing Brief were by me this 12th day of December, 1975, deposited in the United States Mail, first class, postage prepaid, addressed to Mr. F. Irvin Dymond and Mr. William L. Crull,III, counsel for Petitioners, properly addressed at their post office address of 1220 National Bank of Commerce Building, New Orleans, Louisiana 70112, and that all parties required to be served have been thus served this date.

SIDNEY W. PROVENSAL, JR.